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Nos. 86-239 & 86-608

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

CHEMICAL MANUFACTURERS ASSOCIATION,
Petitioner,
v.
NATURAL RESOURCES DEFENSE COUNCIL, INC., *et al.*,
Respondents.

CHICAGO ASSOCIATION OF COMMERCE AND INDUSTRY, *et al.*,
Petitioners,
v.
NATURAL RESOURCES DEFENSE COUNCIL, INC., *et al.*,
Respondents.

On Petitions for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

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BRIEF AMICUS CURIAE OF THE MUNICIPAL PRETREATMENT GROUP IN SUPPORT OF THE PETITIONS FOR CERTIORARI

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The City of Albuquerque, Buffalo Sewer Authority, Metropolitan Sanitary District of Greater Chicago, Gulf Coast Waste Disposal Authority (Texas), City of Indianapolis, City of Memphis, Milwaukee Metropolitan Sewerage District, and Sanitary District of Rockford, Illinois (hereinafter "The Municipal Pretreatment Group") file this brief, *amicus curiae* in support of the petitions for certiorari filed in this case. All parties of record have given their consent to this filing.

STATEMENT OF INTEREST OF THE MUNICIPAL PRETREATMENT GROUP

The Municipal Pretreatment Group has a substantial interest in the outcome of this case. The Municipal Pretreatment Group is an unincorporated coalition of municipalities and special purpose sewerage districts, all of which own and operate publicly owned waste water treatment works ("POTW"s). These municipal authorities either have approved "removal credit" programs under Section 307(b) of the Clean Water Act, 33 U.S.C. § 1317(b) (1982), or have programs under development and in some cases awaiting only final agency approval. Its members, along with other interested cities, constitute the Conference on Removal Credits of the Association of Metropolitan Sewerage Agencies ("AMSA"), a national non-profit association of 100 municipal agencies and special purpose districts which own and operate nearly all of the nation's large POTWs serving a combined population of over 80 million people.

AMSA was a petitioner in the Third Circuit's earlier review of "removal credits", which resulted in a decision upholding the United States Environmental Protection Agency's (EPA) removal credit regulation. *National Association of Metal Finishers v. U.S. Environmental Protection Agency*, 719 F.2d 624 (3rd Cir. 1983) *rev'd in part, sub nom. Chemical Manufacturers Association v. National Resources Defense Council, Inc.*, 470 U.S. 116 (1985).

The Municipal Pretreatment Group filed a motion for late intervention with the Third Circuit in the instant case after the decision was issued but before the denial of rehearing. That motion was denied.

Under Section 307(b) of the Clean Water Act, EPA promulgates categorical pretreatment standards for industrial discharges to POTWs. Congress authorized POTWs to grant "removal credits" to industrial dis-

chargers where pretreatment by industry and subsequent treatment at the POTW would result in duplicative treatment. Removal credits therefore modify categorical pretreatment standards promulgated by the EPA. These credits have become an integral part of the pretreatment programs, either in place or under development, in many industrial communities throughout the country.

The decision of the Third Circuit struck down EPA's removal credit regulations on, *inter alia*, the grounds that EPA has not promulgated sufficiently comprehensive regulations governing the use or disposal of municipal sewage sludge under Section 405 of the Act, 33 U.S.C. § 1345.

The decision below would invalidate all EPA approved pretreatment programs which include removal credits. The decision would also indefinitely suspend the authority of POTWs to grant removal credits in the future. The effect of the decision, if permitted to stand, would be to disrupt years of planning, negotiations, and commitment of resources by POTWs in the development of effective local pretreatment programs.[1]

REASONS FOR GRANTING THE WRIT

I. THE DECISION BELOW RAISES ISSUES OF NATIONAL IMPORTANCE

The decision of the Third Circuit, if allowed to stand, would invalidate EPA's removal credit regulations and thereby dismantle for an indefinite period an essential element of the Clean Water Act's pretreatment program. As a result of that decision, POTWs such as members of the Municipal Pretreatment Group are threatened with substantial and serious disruption of their pretreatment programs.

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[1] Other aspects of the decision find EPA's removal credit program deficient for reasons unrelated to § 405 and could be cured by EPA without necessarily invalidating existing removal credits, or unduly disrupting local pretreatment programs.

These public agencies have developed local pretreatment programs as required by Section 402(b)(8) of the Clean Water Act, 33 U.S.C. § 1342(b)(8). As an integral part of these pretreatment programs, they have applied for and received approval (or have applications under development and pending approval) under 40 C.F.R. § 403.7 to grant "removal credits" to industrial concerns which discharge treated waste water effluent into their POTW systems ("indirect dischargers"). Where already granted, approval for such credits is reflected in NPDES discharge permits issued under Section 402 of the Act, 33 U.S.C. § 1342.

These agencies have invested considerable public resources in the development of pretreatment programs tailored to the particular facts and circumstances of the communities they serve. These investments include sampling, monitoring and reporting with respect to POTW removal capabilities, indirect dischargers' pretreatment systems, receiving water quality and sewage sludge characteristics; developing necessary local industrial waste ordinances; building staff and laboratory capacity for the implementation of the local pretreatment effort; cooperation and negotiation with industrial dischargers; application to and review by state permitting authorities and EPA; and involvement of the public through comment and hearing procedures.[2]

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[2] The experience of the Sanitary District of Rockford, Illinois is illustrative. The District is a unit of local government under the Illinois Constitution and is established pursuant to statutory authority independent of other municipal governments. It first submitted an application for removal credits in draft form to EPA in 1980 based upon its monitoring of influent and effluent data over the previous year. Meanwhile, in preparation for submitting a final application, the District staff substantially revised its local pretreatment ordinance and obtained approval of its Board of Trustees for such changes. This was accomplished in late 1982. Because of ongoing changes in EPA regulations and surrounding uncertainty it was not until September 2, 1983 that the

To the extent that removal credit authority is an integral component of an agency's pretreatment strategy, the Third Circuit's decision in this case effectively destroys these investments of time, money and public credibility made over many years.

The Municipal Pretreatment Group will be particularly affected by that aspect of the decision which, read literally, precludes *any* removal credit program until EPA issues comprehensive sludge management regulations under Section 405(d) of the Act, 33 U.S.C. § 1345(d). With this one stroke of the pen, the Court has invalidated elements of local ordinances, industry/POTW contracts, pretreatment program approvals, and NPDES permits.

Many POTWs have relied upon the participation of ratepaying industrial indirect dischargers. Without the authority to grant removal credits, when appropriate, local industries which, under the decision below, would now be required to meet categorical pretreatment standards may see little advantage to discharging into POTWs and may elect to become direct dischargers. More significant than the loss of revenue to municipal agencies, would be the undesirable consequences of industrial firms becoming direct dischargers rather than being a part of regional systems with better monitoring and control features, one of the principal goals of the Clean Water Act.

District submitted a final application to EPA based upon more recent data and monitoring. The development and submittal of the application for removal credits, extending as it did over a number of years involved extensive staff and management time and a major diversion of scarce resources.

That application was not approved until May 30, 1984 and it was not until January of 1986 that removal credits were incorporated into the District's NPDES permit—approximately six years after the first application was submitted in draft form. As finally approved, the program permits the District to grant removal credits for copper, zinc, chromium, nickel, and lead to 39 separate local metal plating and metal finishing industries. All of these metals are subject to State regulations which limit land application of sludge.

If such industries become direct dischargers, the enforcement and monitoring responsibilities for their effluent would be transferred to the state and Federal environmental protection agencies, thereby increasing the burden on those agencies which may lack the staff and the funding to handle such an increase in work load.

Another potential consequence of the decision below is industry closure. If POTWs are not able to grant removal credits many local industries, particularly those with aging physical plants, may decide to abandon these facilities rather than make the substantial capital improvements necessary to comply with categorical pretreatment standards. If this occurs, the loss of jobs and the erosion of the economic and tax base in these communities will be significant.

II. THE DECISION BELOW UPSETS EPA'S LONG-STANDING INTERPRETATION OF THE CLEAN WATER ACT RELIED UPON BY POTWs.

Prior to the decision below, EPA has interpreted Section 307(b) of the Act to permit local removal credit programs as long as the POTW's chosen method of sludge use or disposal was in compliance with any applicable federal, state or local sludge requirements. (*See*, Federal Respondent's Brief, p. 4). This interpretation is reasonable and consistent with the language of the statute, and permitted the effectuation of the removal credits concept by interested POTWs. The Municipal Pretreatment Group relied on this interpretation in the development of local programs, just as industries relied on local removal credits in planning for their compliance with categorical pretreatment standards.

The decision of the Third Circuit now makes the issuance of additional sludge management guidelines under Section 405(d) a pre-condition for the issuance of removal credits under Section 307(b), effectively rendering that portion of Section 307 a nullity in the interim,

a result Congress could not have intended. The Clean Water Act, through express language makes the removal credit program discretionary with local POTWs under Section 307(b)(1). Yet the Third Circuit's decision removes that discretion entirely despite the fact that, again through express language, the Act makes determinations with respect to sludge disposal or use a matter of local discretion under Section 405(e), 33 U.S.C. § 1345(e), and regardless of the POTW's compliance with all local, state and Federal requirements currently applicable to sludge management practices.

Nothing in the express language of either Section 307(b) or Section 405(d) requires promulgation of sludge regulations for all pollutants and all use or disposal options before any removal credit programs can be implemented. Congress anticipated that the Federal sludge guidelines would evolve over time, and expressly provided not just for initial rulemaking by a date certain, but also for additional promulgations "from time to time thereafter". 33 U.S.C. § 405(d). Had Congress intended to delay the removal credit program until all Section 405(d) rulemakings had been completed, it could easily have provided some explicit trigger mechanism in Section 307(b), or elsewhere in the Act. It did not.

Furthermore, by tying the removal credit authority in Section 307(b) to only federally promulgated sludge regulations under Section 405(d), the Third Circuit has failed to give proper effect to Congress' intent that, in the absence of a Section 405(d) guideline, "the manner of disposal or use of sludge is a local determination". 33 U.S.C. § 405(e).

Section 510 of the Act, 33 U.S.C. § 1370 expressly provides that nothing in the Act shall prohibit states from adopting and enforcing pollution abatement measures provided that the state standards are not less stringent than standards promulgated under the Act. In this case, where there are no federally promulgated sludge stand-

ards that are more stringent, the Act clearly states that state or local laws and regulations shall prevail.[3]

It is entirely possible that existing limitations on sludge disposal in some states will be more stringent than some future EPA promulgated regulations under Section 405 (d). In such a case it is the stricter state regulations already in existence which will govern. The Third Circuit's decision essentially ignores these state and local limitations and the important role they play and may continue to play in the future in protecting the public health.

A particularly burdensome aspect of the decision below is that it leaves both public agencies and indirect dischargers in a legal "no man's land" of sudden noncompliance. Both have relied in good faith on the availability of removal credits. Now, for some indefinite future until Section 405(d) sludge regulations are promulgated, both are potentially subject to enforcement proceedings. Industrial dischargers that completed capital equipment programs in reliance on credits may be immediately out of compliance with categorical pretreatment standards. POTWs, no longer able to grant credits, will be obligated under the terms of their pretreatment program approvals to enforce the categorical standards against industry, or risk enforcement themselves from EPA, state agencies and citizen suits. These significant new enforcement obligations will require increased commitments of resources and personnel. POTWs will have to put local industries on compliance schedules, monitor that compliance, and prosecute those who cannot comply.

The government's opposition to certiorari essentially ignores this aspect of the case. While maintaining that

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[3] For example, the state of Illinois has regulations in place which limit the land application of sludge containing any of the metals for which the Sanitary District of Rockford has authority to grant removal credits. Similarly, the City of Racine, Wisconsin was granted authority to issue removal credits for chromium, zinc and lead, all of which are subject to state sludge regulations.

the Third Circuit's decision is erroneous, and recognizing the hardship it will impose on the regulated community (*See*, Federal Respondent's, Brief, pp. 7, 9-10), the government nonetheless argues against further review on the ground that further "rulemaking efforts now in progress should eventually alleviate the principal burdens created by the decision." (*Id.*, p. 7). EPA's efforts to promulgate sludge regulation under Section 405(d) have already been "in progress" for many years. Proposed rules are expected no earlier than August of 1987. Final rules will undoubtedly require an additional six months to a year to be promulgated if EPA's experience on major regulations is a reliable indicator. Moreover, the odds are great that the final regulations will be challenged judicially, adding another year or two to the process. Thus, for an indefinite and lengthy period, the POTWs and industries effected by the decision below remain at risk of civil and even criminal enforcement proceedings. EPA may eventually alleviate this burden prospectively, but it has done nothing, and offers nothing in its Opposition, to remedy the immediate dilemma faced by both POTWs and their indirect industrial dischargers.

CONCLUSION

The decision below raises issues of national significance. If that decision stands, the removal credit portion of the pretreatment program will be indefinitely suspended and POTWs throughout the country will be faced with the burden of substantially altering their local pretreatment programs. In addition, the significant time and resources POTWs have already committed to the development of programs in compliance with EPA's 1984 regulations will have been largely for naught.

The Third Circuit's decision is also contrary to EPA's reasonable and longstanding interpretation of the Act—an interpretation relied upon by municipalities and industry in the development of effective industrial pretreatment programs.

For all of the foregoing reasons, the Municipal Pretreatment Group urges the Court to grant the petitions for a writ of certiorari.

Respectfully submitted,

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